UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: Case No. 01-64686	:	
Roch T. Gasbarro,	:	
Debtor.	:	
Sanderson Farms, Inc.,	:	
Plaintiff,	:	**Adv. Pro. No. 02-2222**
v.	:	Chapter 7 (Judge Caldwell)
Roch T. Gasbarro,	:	
Defendant.	:	

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order constitute the findings of fact and conclusions of law for the adversary proceeding commenced by Sanderson Farms, Inc. ("Plaintiff"), against Roch T. Gasbarro ("Defendant"). The Plaintiff seeks a non dischargeability determination under sections 523(a)(2)(A) and 523(a)(6) of the United States Bankruptcy Code ("Code"). The dispute is based upon unpaid invoices for three truckloads of chicken ordered by Midwest Farms, Inc. ("Midwest") in February and March of 1996.

The Court has concluded that section 523(a)(6) of the Code is not applicable, and that the Plaintiff has failed to meet its burden by a preponderance of the evidence under section 523(a)(2)(A) of the Code. While there is an extensive history of state court litigation between the parties, this Court has concluded that it is not relevant to a determination of

dischargeability for the three purchase orders at issue. On this basis, the Court has determined that it is unnecessary to discuss those past events. Also, this Court does not have jurisdiction over the individuals and entities that the Plaintiff alleges have engaged in fraud with the Defendant.

Midwest was operated by the Defendant and his brother, Vincent Gasbarro. It began operating in March of 1992, and deboned, marinated and packaged chicken breasts for sale by retail stores and food service vendors. The Defendant testified that Kroger was one of Midwest's largest clients. The Defendant was President of Midwest, and he handled the sales to food service vendors. His brother, Vincent Gasbarro, was the Vice President, and he handled the sales to the retail grocery stores.

The Plaintiff first extended credit to Midwest in June or July 1993. According to Mr. Bobby C. Hill ("Mr. Hill"), the Credit Manager for the Plaintiff, it conducted annual updates on Midwest's account, and reviewed credit reports and references. The Defendant testified that Midwest's oldest invoice generally did not exceed fourteen days. Mr. Hill confirmed that Midwest established a good credit history, and promptly paid until the beginning of 1995.

In 1994 and 1995, there were two major events that changed Midwest's operations. First, the Defendant testified that in 1994 Midwest lost $115,000.00 due to the bankruptcy filing of a company known as A & W. According to the Defendant, this brought Midwest's 1994 net profits down to approximately $200,000.00. Second, the Defendant testified that on April 15, 1995, U.S. Citizenship and Immigration Services raided Midwest, taking eighty-eight percent of its employees. After the raid, it had to buy boneless chicken breasts, because it did not have enough employees to sustain its deboning operation.

Midwest's credit relationship with the Plaintiff became strained. Mr. Hill, testified that he began to see a one or two day delay in payment at the end of the credit relationship. According to Mr. Hill, the payments eventually stopped with no advance notice. Mr. Hill testified that the last three shipping dates on open terms, were February 16, 1996, February 23, 1996, and March 1, 1996. According to Mr. Hill, the Plaintiff usually had two loads outstanding. He testified that the Plaintiff would, however, usually receive a check for the goods, before the third order was shipped.

The Defendant testified that around February 13, 1996, he believed that Mr. John Bernard, Midwest's Controller who is deceased ("Mr. Bernard"), was giving him inaccurate information on Midwest's profit and loss statements. According to the Defendant, Mr. Bernard told him that he had to move some numbers in the balance sheet, and that the Defendant needed to make up a hundred thousand dollars. The Defendant also testified that he noticed that he was drawing more on a line of credit with Bank One. According to the Defendant, however, there was no indication that Midwest was not making money before that time. Consequently, the Defendant terminated Mr. Bernard's employment in early 1996, and hired Harold Pearson ("Mr. Pearson"), as Controller.

On February 14, 1996, the Defendant sent a letter to Mr. Bernard requesting that he turn over information related to Midwest's financial status. Mr. Pearson testified that he reviewed and reconciled all of its bank accounts, inventory, and equipment, and found a loss of $879,072.43 for 1995. After Mr. Pearson's review of Midwest's records, the Defendant, Mr. Bernard, and Mr. Pearson met to discuss the discrepancies in Midwest's balance sheets. Mr. Pearson testified that when he confronted Mr. Bernard about the discrepancies, the Defendant

appeared dumbfounded. Mr. Pearson testified that he did not think that the Defendant knew of the company's negative financial position, and that there was no fraud in the transactions that he reviewed. He also testified that he did not observe any attempts by the Defendant and his family members to render Midwest insolvent.

According to the Defendant, he first became aware that Midwest was losing money around March of 1996. After discovering the accounting discrepancies, the Defendant testified that he immediately called and met with representatives of Bank One and all of his suppliers, including the Plaintiff. On March 6, 1996, Bank One sent a notice of default. On March 8, 1996, the Defendant agreed to an onsite audit by Bank One to be held on March 11, 1996.

Mr. Brian K. Harr ("Mr. Harr") was an Assistant Vice President and a business banker for Bank One between 1995-1996. Mr. Harr confirmed that he was advised during a meeting that what the bank thought was a $400,000.00 positive net worth was in fact a negative $400,000.00 net worth. At that time, Bank One switched Midwest's account to its Managed Assets Department. Mr. Harr testified that a group of Bank One auditors checked the reliability and validity of Midwest's accounts receivable during the one to two week audit. Following the audit, Bank One imposed a lockbox. During that period, Bank One controlled the disposition of Midwest's receivables. Mr. Harr testified that he does not remember finding any irregularities with respect to the Gasbarros or the business.

After an initial phone conversation in early March of 1996, the Defendant and Mr. Hill, on behalf of the Plaintiff, met in Columbus to discuss new payment terms. On or about April 2, 1996, pursuant to a letter from Mr. Hill to the Defendant, the Plaintiff began to ship

chickens to Midwest subject to conditions. Those conditions required that the total amount due on the current order be wire-transferred to the Plaintiff, including an additional amount of approximately $2,500.00, to be applied to the existing debt. The record indicates that between April 4, 1996, and April 15, 1996, Midwest initiated four wire transfer payments pursuant to the conditions in the total amount of $121,230.95. From the wire transfers and additional payments made between May 16, 1996, and January 9, 1997, the sum of $21,250.00 was applied to the arrearage. In July 1996, Midwest ceased operations leaving a balance owed to the Plaintiff in the amount of $118,214.50.

To block the discharge of a debt under section 523(a)(2)(A) of the Code, for false pretenses and false representation, it must be shown that:

> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false, or was made with gross recklessness as to its truth;
> (2) the debtor intended to deceive;
> (3) the creditor justifiably relied on the false representation; and
> (4) the creditor's reliance was the proximate cause of the loss.

Rembert v. AT&T Universal Card Services, In (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998), cert. denied 525 U.S. 978 (1998); Redmond v. Finch (In re Finch), 289 B.R. 638, 643 (Bankr. S.D. Ohio 2003).

False pretenses may be defined as conduct intended to give a false impression that serves as an implied misrepresentation. In re Finch, 289 B.R. at 643 (citing Wings & Rings, Inc. v. Hoover (In re Hoover), 232 B.R. 695, 700 (Bankr. S.D. Ohio 1999)). Mere silence regarding a material fact may constitute a false representation. In re Hoover, 232 B.R. at 700. As debtors are unlikely to admit they intended to deceive, intent may be inferred from their

actions at the time of and subsequent to the loss. In re Finch, 289 B.R. at 643. It is the obligation of the Court to, "consider whether the circumstances, as viewed in the aggregate, present a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor." Bernard Lumber Co. v. Patrick (In re Patrick), 265 B.R. 913, 916-917 (Bankr. N.D. Ohio 2001); Crawford v. Monfort (In re Monfort), 276 B.R. 793, 796 (Bankr. N.D. Ohio 2001); In re Hoover, 232 B.R. at 700.

Intent to deceive may be inferred where the false impressions or representations are made with a reckless disregard for their accuracy. Visotsky v. Woolley (In re Woolley), 145 B.R. 830, 835-836 (Bankr. E.D. Va. 1991); Meggs v. Booth (In re Booth), 174 B.R. 619, 624 (Bankr. N.D. Ala. 1994); Wright v. Fowler (In re Fowler), 165 B.R. 617, 619 (Bankr. N.D. Ohio 1994). The creditor must show justifiable reliance on the representations, which has been defined as a more subjective standard that evaluates the interactions and experiences of the parties. In re Finch, 289 B.R. at 644 n. 4 (citations omitted). To establish proximate cause it must be demonstrated that the conduct was a substantial factor in the loss, or the loss may be reasonably expected to follow. In re Hoover, 232 B.R. at 700.

Section 523(a)(6) of the Code provides that a discharge, "does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." For a debt to be non dischargeable, the moving party must show willful and malicious injury by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). The scope of the willful and malicious injury exception requires that the actor intended the consequences of an act, and not simply the act itself. Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998). Willful means deliberate or intentional, and

requires something more than mere negligence or recklessness. Kawaauhau v. Geiger, 523 U.S. at 61.

Courts in this Circuit, following the guidance of the Supreme Court, have found that section 523 (a)(6) of the Code, requires that the creditor show an intent to cause harm or substantial certainty that the harm will follow. See, e.g., In re Finch, 289 B.R. at 644 (Bankr. S.D. Ohio 2003); Markowitz v. Campbell (In re Markowitz), 190 F.3d 455, 464 (6th Cir. 1999); Beard v. Devore (In re Devore), 282 B.R. 643, 645 (Bankr. S.D. Ohio 2002); Salem Bend Condominium Association v. Bullock-Williams (In re Bullock-Williams), 220 B.R. 345, 347 (6th Cir. B.A.P. 1998).

The Court has concluded that the willful and malicious injury provision, under section 523(a)(6) of the Code, is not applicable. There is no indication that the Defendant intended to harm the Plaintiff, and as previously stated, the willful and malicious standard requires more than mere negligence or recklessness. Regarding, the Plaintiff's claim under section 523(a)(2)(A) of the Code, the Court concludes that the Plaintiff has failed to meet its burden by a preponderance of the evidence, for the following four reasons.

First, there is insufficient evidence to establish false pretenses or fraud. For a substantial period Midwest maintained a good credit history with the Plaintiff. It promptly paid the Plaintiff until its financial problems began to surface at the end of the credit relationship. The Defendant testified that the oldest invoice Midwest had with the Plaintiff generally did not exceed fourteen days. Mr. Hill confirmed that Midwest promptly paid until the beginning of 1995.

The Court is not persuaded that the Defendant sought to render Midwest insolvent, and then resume operations under the name of Ohio Valley Poultry ("OVP"). As the record demonstrates, there was a justifiable reason for opening OVP in the middle of 1995. The Defendant testified that Midwest was expanding into retail sales. It needed more space to accommodate this expansion, as opposed to using the space to debone dark meat. According to the Defendant's testimony, OVP was established to perform this function. To keep his business afloat, the Defendant testified that he received loans from family members. Also, the record indicates that the Defendant entered into transactions with family members to sell Midwest's equipment in order to pay the balance due to Bank One after the receivables were collected. Such facts, rather than indicating fraud or reckless behavior, evidence a debtor who is in financial difficulty, and who is acting along with family members to find some means to pay while sustaining a livelihood.

Second, there is insufficient evidence of an intent to deceive. After discovering the accounting discrepancy and Midwest's negative cash position, the Defendant contacted Midwest's four suppliers, including the Plaintiff, and its major lender, Bank One, to provide notice of Midwest's financial condition, and to discuss new payment terms. Regarding the Defendant's line of credit from Bank One, there is no indication that the Defendant was trying to deceive the bank. He agreed to an onsite audit of its records, and abided by Bank One's imposition of a lockbox. Regarding its debts to the Plaintiff, the Defendant agreed to pay for shipments under new conditions, which included current amounts due, and an additional

payment of $2,500.00 toward the arrearage. A total of $21,250.00 was paid and applied to the arrearage between April 4, 1996 and January 9, 1997. The latter date is months after Midwest ceased operations.

Third, even assuming that the Plaintiff established fraud, it has failed to establish that it justifiably relied. After receiving notice of Midwest's negative financial position, the Plaintiff could have imposed more stringent conditions or discontinued all new shipments to the Defendant until the outstanding debt was paid.

Fourth, the loss suffered by the Plaintiff is not due to fraud, but rather is due to a business that failed based upon a combination of random events, including the bankruptcy of A & W, the loss of employees after the immigration raid, and most of all the discovery of the accounting discrepancies. The Court does not see the Defendant's actions as a conspiracy to avoid payment to the Plaintiff. To the contrary, the Defendant credibly testified that he did his best to notify creditors of his problems and sought to handle the events with some family assistance while trying to maintain a source of income. Such actions should not deprive the Defendant of a discharge of the balance owed.

Accordingly, the Court has concluded that the Plaintiff has failed to meet by a preponderance of the evidence its burden under section 523(a)(2)(A) of the Code. Also, the Court has concluded that section 523(a)(6) of the Code is not applicable. The Defendant is entitled to discharge the obligation.

IT IS SO ORDERED.

Date: 9/27/2005 */s/ Charles M.Caldwell*

Charles M. Caldwell
United States Bankruptcy Judge

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